Date: July 20, 1998

Case No.: 96-INA-00497

In the Matter of:

DUNKIN DONUTS d/b/a B&C DONUTS, INC.,
Employer

On Behalf Of:

JUANA MARIA ARENAS,
Alien

Appearance: Alan E. Pike, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that

the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 5, 1995, Dunkin Donuts d/b/a B&C Donuts, Inc. ("Employer") filed an application for labor certification to enable Juana Maria Arenas ("Alien") to fill the position of Bakery Supervisor (AF 37-38). The job duties for the position are:

> To supervise and coordinate activities of workers engaged in the making of 36 types of donuts, 10 types of muffins and other bakery goods. Oversee operation of all machinery and equipments. Train new workers, keep daily documentation of work performed by workers, resolve worker/employer labor problems. Recommend pay raises and promotions. Address problems with patrons, etc.

The only requirement for the position is three years of experience in the related occupation of "Assistant Shift Supervisor."

The CO issued a Notice of Findings on May 9, 1996 (AF 13-15), proposing to deny certification because the Employer failed to establish that all U.S. workers were rejected solely for lawful, job-related reasons. Specifically, the CO found that one U.S. worker appeared to meet the Employer's stated minimum requirements but, nonetheless, was rejected for the job opportunity.

Accordingly, the Employer was notified that it had until June 13, 1996, to rebut the findings or to cure the defects noted.

In its rebuttal, dated June 6, 1996 (AF 9-12), the Employer stated that it rejected the U.S. applicant in question because he does not have specific experience in the baking industry and, therefore, is not qualified for the job opportunity.

The CO issued the Final Determination on June 20, 1996 (AF 7-8), denying certification because the Employer failed to meet his burden of establishing that all U.S. applicants were rejected solely for lawful, job-related reasons.

Discussion

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) (now recodified as § 656.21(b)(5)) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of good-faith effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

In the instant case, the CO questioned the Employer's recruitment efforts regarding one U.S. applicant, Mr. Savage (AF 14). Specifically, the CO noted that Mr. Savage appears to meet the Employer's stated requirement, which is three years of experience in the related occupation of Assistant Shift Supervisor, but was rejected for lack of specific experience as a baker. As such, the CO instructed the Employer to document the lawful, job-related reasons for rejecting Mr. Savage.

In rebuttal, the Employer reiterated that Mr. Savage does not have any baking experience (AF 11). Specifically, the Employer stated that,

> Knowing the production end of the business, i.e., bakery, is not negotiable. . . . Mr. Savage cannot supervise the production of bakery products if he has no knowledge of how the product is made. He would be unable to correct improper recipes and production methods if he had no bakery experience. He would be unable to critique bakers in the production and to show them the proper methods of baking and shaping products without experience in a bakery.

In addition, the Employer stated that "specialized knowledge and skills are required" for this job opportunity. Finally, the Employer stated that,

> The requirement of three years experience as Bakery Supervisor or Assistant Shift Supervisor, it is clearly implicit in the job description that assistant shift supervisor does not refer to a related occupation. Since the bakery industry requires skills and training, we are not prepared to train an applicant to substitute as a baker as part to his supervisory duties. Mr. Savage has no ideas how many donuts, muffins, etc. are expected to be produced by an employee during each shift, what customer expectations are, and the variability from day to day as to quantities to be produced.

In the Final Determination, the CO found that the Employer failed to establish that all U.S. workers were rejected solely for lawful, job-related reasons.

In considering this matter we note that there is a discrepancy between the Employer's requirements stated on the ETA 750A form and the newspaper advertisements. Specifically, the

ETA 750A form states that the Employer's only experience requirement is three years of experience in the related occupation of "Assistant Shift Supervisor "(AF 37). However, the newspaper advertisements state that the Employer will accept applicants with three years of experience as a Bakery Supervisor or three years of experience as an Assistant Shift Supervisor (AF 25-27).

While we agree with the CO that the ETA Form 750A does not specifically require experience as an "Assistant **Bakery** Shift Supervisor," we find that the position as advertised in the newspaper makes it clear that bakery experience is a prerequisite to performing the job duties. Indeed, a literal reading of the Form 750A would appear to exclude an applicant with 10 years as a Bakery Supervisor, but would accept 3 years as an Assistant Supervisor. Because we find that the job market was adequately tested, by the advertisement in the newspaper, we find that the error in the Form 750A is harmless.

As a general matter, applicants may be rejected for the inability to perform the main job duties. See *Quality Inn,* 89-INA-273 (May 23, 1990). As it is clear that Mr. Savage had no experience as a baker, and as the advertisement indicated that such experience was required, we find that the Employer properly rejected the applicant for failure to possess the ability to perform the main job duties.

Accordingly, the CO's denial of labor certification cannot be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED**, and the CO is directed to grant labor certification.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals

800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.